Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CAROL MAUREEN SOSNA, on behalf of herself and all others similarly situated,	)	
Appellant,	)	October Term, 1973
vs.	)	No. 73-762
THE STATE OF IOWA, and A. L. KECK, individually, and as Judge of the District Court of the State of Iowa in and for Jackson County,	)	

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE

UNITED STATES

No. 73-762

CAROL MAUREEN SOSNA, on behalf of herself and all others similarly situated,

Appellant,

vs.

THE STATE OF IOWA, and A. L. KECK, individually, and as Judge of the District Court of the State of Iowa in and for Jackson County.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

BRIEF OF APPELLANT

REPORTS

The memorandum opinion and order entered on July 16, 1973, by the three-judge court convened in the Northern District of Iowa is attached as Appendix A to the Jurisdictional Statement. The opinion was reported at 42 U.S.L.W. 2086 and 360 F. Supp. 1182.

The memorandum ruling on a special appearance entered on December 27, 1972, by Judge A. L. Keck of the District Court of Iowa in and for Jackson County is attached as Appendix B to the Jurisdictional Statement.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this appeal under 28 U.S.C. Section 1253, which allows a direct appeal to the Supreme Court from a final order of a three-judge court denying a permanent injunction

in a civil action required to be heard by a three-judge court. Appellant herein sought to have enjoined the enforcement of a state statute on the ground that it is unconstitutional. The action was based upon the authority of 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343 (3).

Under 28 U.S.C. Section 2281, such an action must be heard by a three-judge court. On Appellant's application, Chief Judge Matthes ordered the convening of a three-judge court in his order of January 23, 1973. In its order of July 16, 1973, the court denied the relief sought on the ground that the state statutes under challenge do not violate the United States Constitution.

Notice of Appeal to the Supreme Court was filed in the United States District Court for the Northern District of Iowa on September 13, 1973, within the sixty

days allowed by 28 U.S.C. Section 2101 (b).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the following constitutional provisions and statues:

CONSTITUTION OF THE UNITED STATES, Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES, Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CODE OF IOWA, 1973, Section 598.6 (Vol. II, P. 2906):

Additional contents. Except where the respondent is a resident of this state and is served by personal service, the petition for dissolution of marriage, in addition to setting forth the information required by Section 598.5, must state that the petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided, and the length of such residence therein after deducting all absences from the state; and that the maintenance of the residence has been in good faith and not for the pur-

pose of obtaining a marriage dissolution only.

CODE OF IOWA, 1973 Section 598.9 (Vol. II, P. 2907):

Residence - failure of proof. If the averments as to residence are not fully proved, the hearing shall proceed no further, and the action be dismissed by the Court.

CODE OF IOWA, 1973, Section 598.11 (Vol. II, P. 2907):

Temporary orders. The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the other party and the children and to enable such party to prosecute or defend the action.

The court may make such an order when a claim for temporary support is made by the petitioner in the petition, or upon

application of either party, after service of the original notice and when no application is made in the petition; however, no such order shall be entered until at least five days' notice of hearing, and opportunity to be heard, is given the other party. Appearance by an attorney or the respondent for such hearing shall be deemed a special appearance for the purpose of such hearing only and not a general appearance.

CODE OF IOWA, 1973, Section 598.12 (Vol. 11, P. 2907):

Attorney for minor child. The court may appoint an attorney to represent the interests of the minor child or children of the parties. Such attorney shall be empowered to make independend investigations and to cause witnesses to appear and testify before the court on matters pertinent to the interests of the child-

ren. The court shall enter an order in favor of such attorney for fees and disbursements, which amount shall be charged against the party responsible for court costs unless the court determines that the party responsible for costs is indigent in which event the fees shall be borne by the county.

CODE OF IOWA, 1973, Section 598.16 (Vol. 11, P. 2907 and 2908):

Conciliation. A majority of the judges in any judicial district, with the co-operation of any county board of social welfare in such district, may establish a domestic relations division of the district court of the county where such board is located. Said division shall offer counseling and related services to persons before such court.

The court shall require such parties to undergo conciliation for a period of at

least ninety days from the issuance of an order setting forth the conciliation procedure and the conciliator. Such conciliation procedures may include, but shall not be limited to, referrals to the domestic relations division of the court, if established, public or private marriage counselors, family service agencies, community mental health centers, physicians and clergymen. Conciliation may be waived by the court upon a showing of good cause; provided, however, that it shall not be waived if either party or the attorney appointed pursuant to Section 298.12 objects.

The costs of any such conciliation procedures shall be paid by the parties; however, if the court determines that such parties will be unable to pay the costs without prejudicing their financial ability to provide themselves and any minor child-

ren with economic necessities, such costs may be paid from the court expense fund.

CODE OF IOWA, 1973, Section 598.19 (Vol. II, P. 2908):

Waiting period before decree. No decree dissolving a marriage shall be granted in any proceeding before ninety days shall have elapsed from the day the original notice is served, or from the last day of publication of notice, or from the date that waiver or acceptance of original notice is filed or until after conciliation is completed, whichever period shall be longer. However, the court may in its discretion, on written motion supported by affidavit setting forth grounds of emergency or necessity and facts which satisfy the court that immediate action is warranted or required to protect the substantive rights or interests of any party or person who might be

affected by the decree, hold a hearing and grant a decree dissolving the marriage prior to the expiration of the applicable period, provided that requirements of notice have been complied with. In such case the grounds of emergency or necessity and the facts with respect thereto shall be recited in the decree unless otherwise ordered by the court.

CODE OF IOWA, 1973, Section 598. 27 (Vol. II, P. 2909):

Remarriage. In every case in which a marriage dissolution is decreed, neither party shall marry again within a year from the date of the filing of said decree unless permission to do so is granted by the court. Nothing herein contained shall prevent the persons whose marriage has been dissolved from remarrying each other. Any person marrying contrary to the provisions of this section shall de deemed guilty of

a misdemeanor and upon conviction shall be punished accordingly.

CODE OF IOWA, 1973, Section 598.28 (Vol. II, P. 2909):

Separate maintenance and annulment. A petition shall be filed in separate maintenance and annulment actions as in actions for dissolution of marriage, and all applicable provisions of this chapter in relation thereto shall apply to separate maintenance and annulment actions.

28 U.S.C. Section 1253:

Direct appeals from decisions of three-judge courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be

heard and determined by a district court of three judges.

28 U.S.C. Section 1343:

Civil rights and elective franchise. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

****

3. To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. Section 2281:

Injunction against enforcement of State statute - Three-judge court required. An interlocutory or permanent injunction

restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under Section 2284 of this title.

42 U.S.C. Section 1983:

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other per-

son within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTIONS PRESENTED FOR REVIEW

1. Do Sections 598.6 and 598.9 of the Code of Iowa present an unconstitutional infringement upon the Appellant's Fourteenth Amendment right to equal protection of the laws by creating a discriminatory classification which has the effect of penalizing her fundamental right of free interstate migration and which is not justified by a compelling state interest?

2. Do Sections 598.6 and 598.9 of the Code of Iowa present an unconstitutional infringement upon the rights guaranteed to the Appellant by the First Amendment and the Due Process Clause of the Fourteenth Amendment by denying access to the courts through an irrebuttable presumption of law which is overbroad in its reach and which is not jusitifed by a state interest of overriding significance?

3. Should the United States District Court have proceeded to the merits of the constitutional issue presented in light of Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27L. Ed. 2d 669 (1971) and related cases?

STATEMENT OF THE CASE

The Appellant, Carol Maureen Sosna, is presently a resident of Green Island, Jackson County, Iowa. She has resided there since August, 1972, prior to which she resided in the State of New York. She was married to Michael Sosna on September 5, 1964, in the State of Michigan.

In September, 1972, Appellant instituted marriage dissolution proceedings against Michael Sosna, a resident of New York, in the District Court of Iowa, Jackson County, pursuant to Chapter 598 of the Code of Iowa. Personal service was obtained upon Michael Sosna while he was temporarily present in Iowa.

Section 598.6 of the Code of Iowa requires a one-year Iowa residency by a petitioner whose spouse is a non-resident. By order dated December 27, 1972, District Judge A. L. Keck, a co-appellee herein, in a ruling on a special appearance of the respondent, dismissed the petition pursuant to Section 598.9 of the Code of Iowa for want of jurisdiction.

Appellant brought a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure seeking to have Sections 598.6 and 598.9 declared unconstitutional as violative of her rights under the First and Fourteenth Amendments to the U.S. Constitution. Appellant also asked for a permanent injunction against further enforcement of Sections 598.6 and 598.9.

A three-judge district court was convened to consider the merits of the cause pursuant to 28 U.S.C. Section 2281. By order dated July 16, 1973, and signed by Circuit Judge Roy L. Stephenson and Chief District Judge William C. Hanson, with Chief District Judge Edward J. McManus

dissenting, Appellant's complaint was dismissed. Thereafter, on September 13, 1973, Appellant filed Notice of Appeal to the Supreme Court.

SUMMARY OF ARGUMENT

I

The Iowa dissolution of marriage residency requirement creates a discriminatory classification which has the effect of penalizing certain newcomers for having recently exercised their fundamental right of free interstate migration. To withstand review under the Fourteenth Amendment Equal Protection Clause the state must show a compelling justification for the classification. Examination of state interests which have been asserted and which are self-evident discloses no legitimate state interest which approaches compelling status and which could not be adequately protected by a more narrowly drawn statute. Requiring petitioners to plead and prove bona fide domicile would serve any interest the state may have in limiting

access to its courts to residents and would not affect the rights of persons who are actual residents but who have lived in the state less than one year.

II

Since it monopolizes the means by which the fundamental marriage relationship can be adjusted, the state is obliged under the Due Process Clause of the Fourteenth Amendment to provide equal access to the dissolution procedures to all its citizens or to justify any denial of such access by a state interest of overriding significance. No such justification can be shown in light of the available alternative of requiring only the pleading and proving of bona fide domicile. In addition, the residency requirement creates a conclusive presumption of nonresidency which is often not true in fact but which there is no opportunity to rebut. The denial of access to the courts and of an opportunity to controvert the presumption of nonresidency result in a violation of Due Process guarantees.

III

The Younger v. Harris decisions do not imply that the District Court below should have denied relief without consideration of the merits. Later cases have made it clear that the considerations of equity, comity, and federalism do not have the same force where there will be no interference with an ongoing State proceeding. The concern for intervening in criminal prosecutions does not apply to the same effect when a federal court is asked to give equitable relief from an unconstitutional state civil statute. It is not necessary to exhaust state judicial remedies, and the Appellant's choice of a

federal forum must be respected. Actions for relief under 42 U.S.C. Section 1983 involve unique considerations of the proper federal role. An unrestricted judiciary is essential for the continuing protection of individual liberties.

ARGUMENT

DIVISION I

THE REQUIREMENTS OF IOWA CODE SECTIONS 598.6 AND 598.9, THAT A PETITIONER FOR DISSOLUTION OF MARRIAGE WHOSE SPOUSE IS NOT A RESIDENT OF IOWA MUST RESIDE IN IOWA FOR A PERIOD OF ONE YEAR PRIOR TO THE FILING OF THE PETITION, CONSTITUTES A VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A.

THE ONE-YEAR RESIDENCE REQUIREMENT CREATES A DISCRIMINATORY CLASSIFICATION WHICH CAN BE JUSTIFIED ONLY BY A SHOWING THAT IT PROMOTES A COMPELLING STATE INTEREST AND THAT ITS REACH IS NOT UNNECESSARILY OVERBROAD.

Any durational residency requirement automatically creates two classes of persons, indistinguishable but for the length

of their stay within a geographical area. The Iowa dissolution of marriage residency requirement discriminates between persons who have lived in Iowa for a year or more or whose spouses also live in Iowa and persons who have lived in Iowa for less than a year. Persons within the former class may seek to settle their marital grievances in the state courts through dissolution, separate maintenance, or annulment. The latter class may not. Iowa Code ections 598.6, 598.9, and 598.28.

Under the Equal Protection Clause of the Fourteenth Amendment, state laws which create discriminatory classifications must be justified by a countervailing state interest. Generally, a rational connection between the state interest and the classification has been found to satisfy the requirements of the Fourteenth Amendment.

Fleming v. Nestor, 363 U.S. 603 (1960); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

However, where a state law not only creates discriminatory classifications, but affects the exercise of a fundamental constitutional right, the state must show not only a rational connection, but that the classification is necessary to promote a compelling state interest. Sherbert v. Verner, 374 U.S. 398 (1963); Gibson v. Florida Investigation Comm., 372 U.S. 589 (1963).

Recent Supreme Court decisions have clearly recognized that durational residency requirements affect the exercise of such a fundamental right - the right of free interstate migration, the right to travel:

> "(I)n moving from State to State or to the District of Columbia appel-

lees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to promote a compelling governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634, 89 S. Ct. 1322, 1331 (1969).

In Shapiro, the Court found that the justifications for imposing a one year residence requirement on welfare recipients, while rational, were not compelling; and the discrimination was therefore held unconstitutional. 394 U.S. 627, 633, 634, 637, 638.

Similarly, in Dunn v. Blumstein, 405 U.S. 330, 339, 92 S. Ct. 995, 1001 (1972), holding invalid a residency requirement for voting, the Court said, "Preceded by a long line of cases recognizing the constitutional right to travel, and repeated-

ly reaffirmed in the face of attempts to disregard it, ..., Shapiro and the compelling-state-interest test it articulates control this case."

Again holding Shapiro to control the standard of review, the Court said in Memorial Hospital v. Maricopa County, 94 S. Ct. 1076, 1080 (1974). "We agree with appellants that Arizona's durational residency requirement for free medical care must be justified by a compelling state interest..."

The status of the right to travel freely from state to state as fundamental constitutional right is beyond argument. Shapiro v. Thompson, 394 U.S. 618, 630, 630 n.8, 89 S. Ct. 1322, 1329, 1329 n.8; Memorial Hospital v. Maricopa County, 94 S. Ct. 1076, 1080, 1080 n.7; Dunn v. Blumstein, 405 U.S. 330, 338, 92 S. Ct. 995, 1001.

The compelling state interest test is "triggered" by any classification which exacts a "penalty" on the exercise of the right to travel. Dunn v. Blumstein, 405 U.S. 330, 340, 92 S. Ct. 995, 1002. A one-year wait required only of persons who have recently exercised their right to travel and who wish to petition for a dissolution of marriage is such a penalty.

It could be argued that the compelling interest test should not be triggered where the benefit denied to newcomers by the residency requirement is not a "basic necessity of life". Such an argument might claim to find support in some language of Maricopa County, 94 S. Ct. 1076, 1082, 1083, 1084. That language is used in connection with the issue of how severe a "penalty" is required to raise the compelling interest test. It has been argued by Appellee and by the majority below, 360

F. Supp. 1182, 1184, that the right to a divorce does not enjoy fundamental status and that the consequent penalty upon the free exercise of the right to travel is thus not in a class with the penalties of Shapiro, Dunn, and Maricopa County.

The Supreme Court recently had occasion to discuss the status of marriage and divorce. Discussing Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780 (1971), the Court said:

> "The denial of access to the judicial forum in Boddie touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. See, for example,

Loving v. Virginia, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967); Skinner v. Oklahoma, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); Eisenstadt v. Baird 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972); Meyer v. Nebraska, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1973). The Boddie appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities." U.S. v. Kras, 409 U.S. 434, 444, 34 L. Ed. 2d 626, 635, 93 S. Ct. 631, 640 (1973).

Withholding the right to seek adjustment of the most fundamental of human relationships by the only means available is to impose a penalty of unquestionable

harshness. For persons without the resources to travel to the state where the spouse resides or for persons who are unable to locate their spouses, the marital state is simply frozen for as long as the required period runs. The aggrieved spouse is prohibited by law from attempting to re-establish a normal two-parent family; and irreparable financial and emotional damage may be done to the spouse and the children. With the statutory ninety-day waiting period and the year prohibition on remarriage Iowa Code Sections 598.19, 598.27, the family may be unable to regain normalcy for two years and three months.

An argument that the penalty is inadequate ignores the language of Dunn, 405 U.S. 341, 92 S. Ct. 1003:

> "The right to travel is 'an unconditional personal right', a right whose exercise may not be condi-

tioned... Durational residence laws impermissably condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right... Absent a compelling state interest a State may not burden the right to travel in this way."

Elsewhere, the "penalty" in the residency requirement context has been described as the suffering of "disadvantage, loss or hardship due to some action". Cole v. Housing Authority of City of Newport, 435 F. 2d 807, 810 (1st Cir. 1970). When a person is prohibited from obtaining a final resolution of the most fundamental conflict in her life for the lone reason that she has recently exercised her "unconditional personal right" to travel, her use of that right has been "conditioned" and "penalized".

Because she has elected to exercise her constitutionally protected right to travel, the Appellant is now denied the opportunity to seek a dissolution of her marriage, a right which all are free to exercise except certain newcomers. It could be argued that she is not denied this right because she could go back to New York and bring her action in the courts of that state. But the Appellant is of limited economic means, and to force her to undergo the expense and inconvenience of a return to New York would be to require of the Appellant a great personal and financial sacrifice. The sacrifice is made necessary solely by the fact that the Appellant has lived in Iowa less than a year. Thus, her exercise of her right to travel from New York to Iowa has been penalized by the Iowa durational residency requirement. The Appellant has been forced

to choose between the exercise of her right to travel and the exercise of her right to seek a settlement of her marital grievances. Because she has chosen the former she is denied the latter.

A further element of Equal Protection scrutiny is to ascertain whether a state classification, compellingly justified or not, sweeps overbroadly, abridging constitutionally protected rights of persons whose inclusion in the class is unnecessary to serve the legitimate interests of the state. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965). In Dunn, 405 U.S. 343, 92 S. Ct. 1003, the Court said:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the

> State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision', NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405 (1963); United States v. Robel, 389 U.S. 258, 265, 88 S. Ct. 419, 424, 19 L. Ed. 2d 508 (1967), and must be 'tailored' to serve their legitimate objectives. Shapiro v. Thompson, supra, 394 U.S. at 631, 89 S. Ct. at 1329. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means'. Shelton v. Tucker, 364 U.S.

479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231 (1960).

In summary, the Iowa dissolution of marriage residency requirement must be found to violate the Fourteenth Amendment guarantee of equal protection of the laws unless the penalty which it exacts for the exercise of the fundamental right of interstate migration is shown to be justified by a compelling state interest and unless it is shown to be precisely drawn and not overbroad in its reach.

> "Not unlike the admonition of the Bible that, 'Ye shall have one manner of law, as well for the stranger as for one of your country,' Leviticus 24:22, the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate

> as are enjoyed by other residents." Memorial Hospital v. Maricopa County, _____ U.S. _____, 94 S. Ct. 1076, 1084.

B.

THE PENALTY ON THE RIGHT TO TRAVEL WHICH RESULTS FROM THE IOWA DISSOLUTION RESIDENCY REQUIREMENT IS NOT JUSTIFIED BY ANY COMPELLING STATE INTEREST EXCEPT, POSSIBLY, THE INTEREST IN LIMITING THE JURISDICTION OF STATE COURTS; AND THAT INTEREST CAN BE ADEQUATELY PROTECTED BY A MORE NARROWLY DRAWN STATUTE.

Once the exercise of a protected freedom has been shown to be penalized and the compelling-state-interest test has been "triggered", the state's compelling interest must be either affirmatively shown or self-evident; or the statute in question should fail Equal Protection scrutiny. Richards v. Thurston, 424 F. 2d 1281, 1286

(1970). Examined herein are state interests which are apparent and those which have been asserted by the Appellee and by other states in similar cases.

1. One possible state interest in a durational residency requirement is to deter persons with marital problems from entering the state. The Court in Shapiro v. Thompson held that "the purpose of inhabiting migration by needy persons into the state is constitutionally impermissible", 394 U.S. at 629, 89 S. Ct. at 1329. The Court also found a similar purpose to be invalid in Memorial Hospital v. Maricopa County, 94 S. Ct. at 1085. Both Shapiro and Maricopa County involved migrants who sought to draw upon local finances and services. It is even harder to justify the exclusion of persons who seek only access to the courts. See also Wymelenberg v. Syman, 328 F. Supp. 1353, 1355 (E.D. Wisc. 1971).

2. States have asserted an interest in encouraging reconciliation of persons with marital problems and in the maintenance of marital stability. It is claimed that the residency requirement serves as a waiting period encouraging a "cooling-off" of emotions and attempts at reconciliation. However, the waiting period is required only of certain newcomers and not of all persons seeking a dissolution. Iowa Code Section 598.6 (1973). Clearly, the distinction cannot be rationally supported. And, even though an interest may be valid, "a state cannot accomplish such a purpose by invidious distinctions between classes of its citizens". Shapiro v. Thompson, 394 U.S. 618, 633. Also see Wymelenberg v. Syman, 328 F. Supp. 1353, 1355.

In addition, the Iowa dissolution chapter provides for a ninety-day cooling-off period to be required of all persons

seeking a dissolution. Iowa Code Section 598.19 (1973). Any legitimate state interest in encouraging reconciliation in all troubled marriages is adequately served by this provision and by the conciliation procedures of Iowa Sections 598.16 and 598.19 (1973).

3. A third possible interest is the administrative convenience afforded by a durational residency requirement in providing evidence of domicile. It is well settled that administrative convenience is not adequate justification for the infringement of constitutional rights. Dunn v. Blumstein, 405 U.S. 330, 351, 92 S. Ct. 995, 1007; Shapiro v. Thompson, 394 U.S. 618, 636, 89 S. Ct. 1332; Schneider v. Rusk, 377 U.S. 163, 167, 84 S. Ct. 1187, 1189 (1964).

"States may not casually deprive a class of individuals of the vote because

of some remote administrative benefit to the State." Carrington v. Rash, 380 U.S. 89, 96, 85 S. Ct. 775, 780 (1964).

> "The State's legitimate purpose is to determine whether certain persons in the community are bona fide residents. A durational residence requirement creates a classification that may, in a crude way, exclude nonresidents from that group. But it also excludes many residents. Given the State's legitimate purpose and the individual interests that are affected, the classification is all too imprecise." Dunn v. Blumstein, 405 U.S. 330, 351, 92 S. Ct. 995, 1007.

4. The reputation of the state may be asserted as a fourth possible interest. It may be claimed that removing the residence requirement would attract forum-shopping migrant litigants, would earn

for the state a reputation as a "quickie divorce mill", or what the majority below called "a virtual sanctuary for transient divorces based on sham domiciles", 360 F. Supp. at 1184, and would make the state a party to surreptitiously obtained divorces. However, by requiring each petitioner to plead and prove actual good faith domicile, such a result could be avoided without the infringement of a protected right. Wymelenberg v. Syman, 328 F. Supp. 1353, 1356. A state judiciary which routinely determines the best interests of the children of the parties, a fair division of the financial resources, and whether a marriage relationship has broken down "to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved", Iowa Code Section 598.17, should

not find an insurmountable challenge in deciding whether a Petitioner has proved bona fide domicile.

To the argument that the residency requirement prevents surreptitiously obtained divorces without notice to nonresident spouses, reference is made to Iowa Rules of Civil Procedure 60 (i) and 60.1 providing that notice by publication and mailing is sufficient notice to a nonresident spouse for the Iowa courts to obtain jurisdiction over the marital res. If such a procedure is not "surreptitious" for long-time residents with out-of-state spouses, it is not less for newcomers.

5. A fifth asserted interest is to guarantee the protection of the welfare of children affected by the dissolution. But there are other more effective ways to protect such children, and delaying the courts jurisdiction over a hostile family situa-

tion may work a great harm upon the children. Iowa Code Sections 598.11 and 598.12 (1973) provide for temporary orders for the support and maintenance of the children and for the appointment of an attorney to protect the interests of the children. The best interests of any children concerned are more likely to be served by the speedy involvement of the court system than by a year's delay.

6. Another interest - cited by the majority below, 360 F. Supp. at 1184 - is in discouraging the judiciary from interfering in the marriages of nonresidents in whom the state has no interest. But where a petitioner is able to show that she is a good faith resident, the state has an interest in the marriage even though the petitioner has lived in Iowa less than a year. The argument is inconsistent with the fact that under Iowa

Code Section 598.6 (1973) a nonresident petitioner is allowed to seek a dissolution in Iowa, no matter how short the respondent's period of residence may be. See Sosna v. Iowa, 360 F. Supp. 1182, 1188 (McManus, J., dissenting).

7. It has been argued that the state has an interest in protecting its tax-supported institutions from use by non-residents. Again, a requirement that petitioners satisfy the court that they are domiciled in the state in good faith is a more precise method of protecting the state treasury with the least interference in the exercise of constitutional liberties. Actual non-residents and persons whose residence is maintained solely for the purpose of obtaining a dissolution would still be denied access to the state-financed judicial machinery. See Larson v. Gallogly, 361 F. Supp. 305 (D.R.I.

1973). In Mon Chi Hueng Au v. Lum, 360 F. Supp. 219, 222 (D. Ha. 1973), a three-judge court held:

> "Absolute durational residence requirements on divorce are, nevertheless, constitutionally flawed in that their efficacy in isolating those nondomiciliaries most likely to assault divorce courts is accompanied by an inability to segregate bona fide domiciliaries from those so isolated."

8. It is conceivable that a state's interest in limiting the jurisdiction of its courts so that their judgments will be accorded full effect in other jurisdictions could be held to be a compelling interest. A durational residency requirement may insure that the court has jurisdiction of the person of at least one of the parties. However, this interest can be protected as

well by requiring petitioners to show bona fide domicile as by requiring a one-year residence period. The Supreme Court has held that the courts of a state in which one party is domiciled are empowered to issue a decree terminating the marital status and that such a decree must be accorded full faith and credit by all other states. Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207 (1942). If the jurisdictional interest can be protected by requiring a showing of domicile, and if domicile can be established in a shorter period than one year, then a one-year residence requirement is impermissibly overbroad, as it must affect the rights of some persons who could prove domicile but who have resided in the state less than one year. Dunn v. Blumstein 405 U.S., 330, 343, 351 92 S. Ct. 995, 1003, 1007.

It is well established that domicile is shown by physical presence plus animus manendi, the intention of remaining. Newton v. Mahoning County Com'rs, 100 U.S. 548 (1879). In Iowa, the point is clearly settled. See, for example, Garberson v. Garberson, 82 F. Supp. 706 (D. Ia. 1949), holding that "domicile" is the concurrence of physical presence in a place with present intention of residing there indefinitely; Anderson v. Blakesby, 136 N.W. 210, 155 Iowa 430 (1929); and In re Colburn's Estate, 173 N.W. 35, 186 Iowa 590 (1919).

The intention of remaining in a place can be shown by objective indicia such as purchasing or renting a home, obtaining a car or driver's license, registering to vote, seeking employment, and entering one's children in school. Dunn v. Blumstein, 405 U.S. 330, 352, 92 S. Ct. 995, 1008; McCay v. South Dakota, 336 F.

Supp. 1244, 1247 n.3 (1974).

At the time her petition was filed, the Appellant herein was physically present in the State of Iowa and attempted to prove by tangible evidence her intent to remain. Her children attend Iowa schools, she has voted in Iowa, she has a permanent place of residence in Iowa, and she is permanently employed in Iowa. The only judge to address this issue was satisfied that bona fide domicile was shown. Sosna v. Iowa, 360 F. Supp. 1182, 1186 n.2 (McManus, J., dissenting). The constitutionally permissible requirements for the court's jurisdiction over the Appellant's person and marital status were satisfied, but her petition was dismissed because she had been present in Iowa less than a year.

DIVISION II

THE ONE-YEAR RESIDENCE REQUIREMENT CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY DENYING TO PERSONS WHO SATISFY CONSTITUTIONAL JURISDICTIONAL REQUIREMENTS FREE ACCESS TO THE COURTS, ABRIDGING THEIR FIRST AMENMENT RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES.

Because the state monopolizes the procedural means for terminating a marriage, a statutory suspension of access to that procedure effectively cuts off an individual's opportunity to obtain relief from marital grievances. In Griffin v. Illinois, the Supreme Court held that once a state opens its courts to criminal appeals it cannot discriminate against those unable to pay the cost of a transcript, 351 U.S. 12 (1956). It has also been held that a purpose of the Fourteenth Amendment

was to give the people "like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts...." Barbier v. Connolly, 113 U.S. 27, 31 (1885). See also Truax v. Corrigan, 257 U.S. 312 (1921). The Griffin rationale was applied to divorce actions in Boddie v. Conn., where the Supreme Court held that requiring an indigent Plaintiff to pay the court costs of a divorce action violates the Due Process requirement because of the "basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship....," 401 U.S. 371, 374, 91 S. Ct. 780, 784 (1971).

In Boddie the Court set the standard of review when access to the divorce

courts is denied to a class of persons:

> "Prior cases establish, first that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." 401 U.S. at 377, 91 S. Ct. at 785.

> "Drawing upon the principles established by the cases just canvassed, we conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of a sufficient contervailing

> jusitification for the State's action, a denial of due process." (footnote omitted) 401 U.S. at 380, 91 S. Ct. at 787.

It is not clear whether the countervailing-state-interest-of-overriding-significance test is a different standard from the compelling-state-interest test. But, if there is a difference, it is clear that where they arise to challenge the same asserted state jusitification, the stricter test must be satisfied. In Wymelenberg v. Syman, 328 F. Supp. 1353, 1365, the court concluded its opinion:

> "In that (the residence requirement status) precludes 'the adjustment of a fundamental human relationship,' Boddie v. Connecticut, 401 U.S. at 383 by 'bona fide' Wisconsin residents for as long as two years simply 'because they have recently moved

into the jurisdiction,' Shapiro v. Thompson, 394 U.S. at 634, the prior mandates of the United States Supreme Court compel us to find, whether judged by the equal protection clause 'compelling interest' test or by the due process clause 'overriding significance' test, that (the statutory waiting period) constitutes an unconstitutional impingement upon the Fourteenth Amendment of the United States Constitution."

Where no state justification which has been shown or which is self-evident measures up to the compelling-state-interest test in light of the less restrictive available alternative of requiring the pleading and proving of bona fide domicile, it would be a semantic parody to claim that an overridingly significant countervailing state interest is shown among

those considered.

The Appellant herein was denied access to the only available means of seeking relief from her marital greivances for the sole reason that she had moved into the state more recently than a year before filing her petition. As in Boddie, where the payment of a filing fee constituted an absolute precondition to access to the divorce court, the Iowa residency requirement presents an impenetrable obstacle to the newly-arrived petitioner. In Boddie, access could be gained only by accumulating the filing fee, in the instant case, only by the passage of time. In both cases, persons with genuine grievances are prevented from presenting them to the only body authorized to give relief. In both cases, the state's reasons are inadequate to justify this result.

In Boddie, the Court was careful to

note that, "we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are beyond dispute". 401 U.S. at 382, 91 S. Ct. at 788. In the instant case the bona fides of Appellant's desire for divorce and domicile are beyond dispute, and the limited rule of Boddie should apply:

> "Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 401 U.S. at 383, 93 S. Ct. at 789.

In Vlandis v. Kline, _____ U.S. _____, 91 S. Ct. 2230 (1973), the Supreme Court found that the Due Process Clause of

the Fourteenth Amendment was violated by a statute which created an irrebuttable presumption that any state university student who was a nonresident at the time of admission remainded a nonresident for the entire period of his attendance, where the presumption was often not true in fact and where there was a reasonable means of determining when the presumption of nonresidency did not suit a specific instance.

In Heinar v. Donnan, 285 U.S. 312 at 329, 52 S. Ct. 358 at 362 (1932) The Supreme Court emphasized that it had "held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the Due Process Clause of the Fourteenth Amendment." For more recent support, see Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972; Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586 (1971).

The instant case is similar to Vlandis in that the challenged statute creates an irrebuttable presumption of nonresidency which is often not true in fact and for which reasonable means exist to rebut the presumption. By conclusively presuming that any person who has not lived in Iowa for a year is a nonresident and by not affording an opportunity for a petitioner to show that the presumption is untrue for her case, the residency statute deprives such a petitioner of a significant liberty without the guaranteed protection of due process.

In Vlandis, ____ U.S. at _____, 93 S. Ct. at 2237, the Court said:

> "We hold only that a permanent rebuttable presumption of nonresidence .... is violative of the Due Process Clause because it provides no opportunity for students who applied from

> out of state to demonstrate that they have become bona fide Connecticut residents."

Although the Iowa statute is a one-year, and not a permanent, presumption, the violation of due process is clear. In Dunn v. Blumstein, 405 U.S. at 352, 92 S. Ct. at 1008, the Court said:

> "But since Tennessee's presumption from failure to meet the durational residence requirements is conclusive, a showing of actual bona fide residence is irrelevant, even though such a showing would fully serve the State's purposes embodied in the presumption and would achieve those purposes with far less drastic impact on constitutionally protected interests." (footnote omitted)

Through Chapter 598 of the Code of Iowa (1973) the State of Iowa has created

a monopoly over the means for adjusting the marriage relationship. The residency requirement of Sections 598.6 and 598.9 denied the Appellant access to that monopolized means until she could satisfy that threshhold obligation. No meaningful alternative was available, since the residency requirement is also applied to actions for annulment and separate maintenance. Iowa Code Section 598.28 (1973). This denial of access to the court is not justified by any state interest which has been asserted or which is self-evident and which could satisfy the strict due process standard of review in light of the less restrictive alternative available. In addition, the Appellant has been denied access to the court through a state-created presumption of law which is untrue for her case but which she is not given an opportunity to rebut. She has been denied her

right to petition the courts for redress of her marital grievances under conditions which disregard her Fourteenth Amendment guarantee of Due Process.

DIVISION III

THE HOLDINGS OF YOUNGER V. HARRIS AND RELATED CASES DO NOT IMPLY THAT THE U.S. DISTRICT COURT BELOW SHOULD NOT HAVE PROCEEDED TO THE MERITS OF THE CONSTITUTIONAL ISSUES PRESENTED.

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971), and its companion cases reaffirmed certain principles controlling the use of federal court equity power to intervene in threatened or pending state criminal cases. In general, it was held that, unless irreparable harm appears from a showing of bad faith enforcement or harassment, principles of equity jurisprudence, comity, and federalism preclude the use of a federal injunction restrain-

ing enforcement of a disputed state criminal statute. In the companion case of Samuels v. Mackell , 401 U.S. 65, 91 S. Ct. 764 (1971), it was held that where a state prosecution is pending, the same considerations which preclude the issuance of an injunction also preclude the use of a declaratory judgment unless unusual circumstances are shown.

Federal courts have long been reluctant to interfere in the state criminal process, and the guiding principle from the Younger cases may be that federal courts should refuse to act whenever it is clear that the constitutional claims of the federal plaintiff can be adequately adjudicated in the state criminal proceeding.

The issue now presented by the Court in its note of probable jurisdiction is whether the foregoing principles should have led the District Court below to conclude that it was improper to proceed to

the merits. Such a conclusion is not clearly directed by prior decisions of the Supreme Court.

The instant case presents a factual situation critically dissimilar to the circumstances of the Younger cases. In her Complaint (A.1) the Appellant sought injunctive and declaratory relief under 42 U.S.C. Section 1983, 28 U.S.C. Section 1343 (3) and 28 U.S.C. Section 2201. Her petition for a dissolution of marriage had been dismissed by the District Court of Iowa for want of jurisdiction after presentation of her constitutional contentions to that court. There was no action pending. The Complaint did not ask that a pending state court action be stayed or enjoined; it asked that Sections 598.6 and 598.9 of the Code of Iowa be declared unconstitutional and that future enforcement of those sections by the state be

enjoined. The disputed state statutes are civil and not criminal. And the Appellant seeks not to stop a court proceeding, but to be allowed to start one.

In decisions since Younger, the Court has made it clear that the considerations warranting restraint in Younger do not apply where there is no contemporaneously pending state court proceeding. Steffel v. Thompson, _____ U.S. _____, 94 S. Ct. 1209, 1217 (1974): Lake Carriers' Assoc. v. Mac Mullan, 406 U.S. 498, 509, 92 S. Ct. 1749, 1757 (1972). In Lake Carriers', speaking of the Younger decisions, the Court said:

> "The decisions there were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding. In that circumstance, exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met." 406 U.S. at 509, 92 S. Ct. at 1757.

If these decisions are to have effect, the issue in the instant case, where there is no pending state court proceeding, becomes whether there exist proper circumstances for declaratory or injunctive relief. Generally, an injunction to restrain enforcement of an unconstitutional state law should not issue unless it is shown that the moving party has no adequate remedy at law and that he will suffer irreparable harm if denied equitable relief. Younger v. Harris, 401 U.S. 37, 43, 91 S. Ct. 746, 750; Douglas v. City of Jeannette, 319 U.S. 157, 63 S. Ct. 817 (1943). However, the requirement that irreparable harm be demonstrated does not apply to declaratory judgments, Steffel v.

Thompson, ____ U.S. _____, 94 S. Ct. 1209, 1222; nor does the need for a lack of an alternative legal remedy, Perez v. Ledesma, 401 U.S. 82, 123, 91 S. Ct. 674, 696 (1971).

Irreparable harm is damage which cannot be adequately compensated by a judgment of law or by money consideration, either because of the nature of the injury or the impossibility of accurately estimating the damage. Ohio Oil Co. v. Conway, 279 U.S. 813, 49 S. Ct. 256; Harrison-Pottawattamie Drainage District v. Iowa, 156 N.W. 2d 835 (1968). To forego constitutionally protected activity in order to avoid arrest is to be harmed beyond pecuniary compensation. See Steffel v. Thompson, 94 S. Ct. 1209, 1218 n.12. Sufficient incompensable harm to warrant injunctive relief should be apparent when a constitutionally flawed state statute

has the direct effect of prohibiting the adjustment and reconstruction of the most fundamental aspect of the Appellant's life, and when that effect is not only unnecessary but an invidious penalty upon the exercise of another essential liberty. The Appellant has not been forced to choose whether to forego protected activity. She has had the choice withdrawn as a penalty for engaging in other protected activity. The unjustified suspension of the status of the Appellant and her children cannot be compensated. Justice delayed is justice denied. In Mitchum v. Foster, 407 U.S. 225, 242, 92 S. Ct. 2151, 2162, (1972), the Supreme Court said:

> "And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great immediate, and irrepar-

able loss of a person's constitutional rights. Ex Parte Young, 209 U.S. 123, 23 S. Ct. 441, 52 L. Ed. 714; ...."

The District Court properly did not refrain from considering the merits on the ground that the issue should have been presented in a state court appeal. Discussing the role of federal courts in Zwickler v. Koota, 389 U.S. 241, 248, 88 S. Ct. 391, 395 (1967), the Supreme Court said:

> "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility,

> equally with the federal courts, *** to guard, enforce and protect every right granted or secured by the constitution of the United States ***'. Robb v. Connolly, 111 U.S. 624, 637, 4 S. Ct. 544, 551, 28 L. Ed. 542. 'We yet like to believe that whenever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.' Stapleton v. Mitchell, D. C., 60 F. Supp. 51, 55;..."

It is not necessary to exhaust state judicial remedies before seeking federal relief. "It is no answer that the State has a law which, if enforced, would give relief. The federal remedy is supplemen-

tary to the state remedy, and the latter need not be first sought and refused before the federal one is involved." Monroe v. Pape, 365 U.S. 167, 183, 81 S. Ct. 473, 482 (1961). See also Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971).

The Younger decisions were motivated by a desire to minimize federal interference in state criminal proceedings. See, for example, Younger v. Harris, 401 U.S. 37, 55, 91 S. Ct. 746, 757 (Stewart, J., concurring). The implications of the Younger doctrine of restraint for civil proceedings have never been articulated. See, Mitchum v. Foster, 407 U.S. 225, 244, 92 S. Ct. 2151, 2163 (Burger, C. J., concurring). The considerations are distinctly different. In the instant case the state was not a party to the action which the Appellant sought to commence. Equitable

relief will not result in an interference with the orderly operation of the state judicial and prosecutorial machinery. The cases have emphasized a concern for interrupting criminal proceedings. Disregarding the fact that the Appellant does not seek to interrupt any ongoing proceeding, the consequences of federal intervention in a civil proceeding are of much less direct concern to the state and the public interest than intervention in the criminal process.

It has been commented that the Younger decisions present the proposition that equitable relief is not properly invoked where the moving party claims only that he is "chilled" in the exercise of protected liberties because of the mere existence of an unconstitutional law. E.g., Note, Implications of the Younger Cases for the Availability of Federal

Equitable Relief When No State Prosecution is Pending, 72 Col L. Rev. 874 (1972). The Appellant in the instant case presents a claim of more substantial harm than a "chilling" effect. If the Appellant had considered the Iowa residency requirement before entering the state and had decided not to move to Iowa for that reason, the claim might be a "chilling" effect upon her right to travel. But, in fact, she exercised her right to travel and the harm threatened by the existence of the residency requirement was accomplished by her exclusion from the court system.

A parallel in criminal proceedings may be attempted. The status of the Appellant's case is as though the threatened prosecution had been carried out and she has been convicted under a flawed statute. She now seeks review of

that statute under a rough equivalent of a habeas corpus action. The Appellant's federal claim was brought under 42 U.S.C. Section 1983 which is a unique statutory escape mechanism for those who are trapped by an unconstitutional operation of state authority.

The special status of actions under 42 U.S.C. Section 1983 has been made clear. In Mitchum v. Foster, 407 U.S. 225, 243, 92 S. Ct. 2151, 2162, the Court held that Section 1983 falls within the "expressly authorized" exception of the anti-injunction act, 28 U.S.C. Section 2283. In its opinion, the Court said:

> "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th Century when the anti-injunction statute was enacted. The very purpose of

Section 1983 was to interpose the federal courts between the State and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial'. Ex Parte Virginia, 100 U.S. at 346, 25 L. Ed. 676. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in Section 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress." 407 U.S. at 242, 92 S. Ct. at 2162.

The language of the Court's note of probable jurisdiction suggests a connection with the holding of Samuels v. Mackell, 401 U.S. 66, 91 S. Ct. 764,

which held not merely that an injunction was improper, but that relief should have been denied without consideration of the merits. Samuels involved pending state prosecutions, and the Court found the reasoning of Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S. Ct. 1070 (1943), to be controlling. However, Great Lakes involved an attempt to have enjoined a state tax collection; and, as in Samuels, the Court held that there was an adequate remedy available in the state courts. In Samuels, as in Younger, the Court found that the criminal defendant could raise his constitutional claims in the course of his defense. The situations are not like the instant case, where (1) there is no pending state proceeding, and (2) the Appellant's constitutional claims were raised and denied. The Appellant now looks to the federal

court for equitable relief from unconstitutional judicial action under color of state law.

The narrow question of whether the District Court should have proceeded to the merits of the constitutional issues must be answered in the affirmative. The question is not the same as whether an injunction is proper in this case. Under Steffel v. Thompson and Lake Carriers' Association v. Mac Mullan a request for declaratory relief is properly considered where there will be no interference with an ongoing state proceeding. Whether it is an appropriate instance for the issuance of injunctive relief as well as a declaratory judgment is a separate question. It is an unsettled issue whether declaratory judgments carry sufficient effect to guarantee the protection of the liberties in question. Steffel v.

Thompson, 94 S. Ct. 1224 (White, J., concurring), 94 S. Ct. 1226 (Rehnquist, J., concurring); Perez v. Ledesma, 401 U.S. 82, 125, 91 S. Ct. 674, 697. If a litigant must take his declaratory judgment into the state court, hoping that the state court will give the federal statement of rights some res judicata effect, the litigant has been afforded something less than the swift and sure protection of the federal courts.

It is interesting to note that the case of Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780 (1971), which involved a situation remarkably similar to the instant case, was decided only a week after the Younger Cases. Boddie was a class action appeal from a three-judge court which denied declaratory and injunctive relief. The Supreme Court reversed on the merits without mention of an issue

arising from the principles of Younger.

To refuse to consider the merits of the constitutional issues herein would conflict with the following language from Steffel v. Thompson, 94 S. Ct. at 1222:

> "In the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343 (3) -- as they are here -- we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional

> rights. See, e.g., McNeese v. Board of Education, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no prosecution had commenced."

Because the body of personal liberties which have developed under our Constitution and federal system cannot flourish and be vigilantly protected without a strong and unshackled federal judiciary, the Younger decisions should be narrowly construed.

CONCLUSION

The Appellant is entitled to a declaratory judgement finding that the Iowa dissoution of marriage residency requirement violates her Fourteenth Amendment rights and to a permanent injunction enjoining future enforcement of the unconstitutional sections of statute.

Respectfully submitted,

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